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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 648

ERNEST DEWAR, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority (R. 21-28) [1] and concurring (R. 28-29) opinions in the Court of Appeals are re-

[1] The typewritten record in this Court is in three parts, which are not paginated consecutively. The first 37 pages, containing the pleadings in the District Court and the proceedings in the Court of Appeals, are referred to herein by the designation "R." Immediately following, in 91 pages, is the "Transcript of Proceedings" in the District Court. These pages will be referred to by the designation "Tr." Finally, there is the photostatic copy of petitioner's court-martial record, in 117 pages, which was received in evidence at the

ported at 170 F. 2d 993. An informal, oral opinion of the District Court, not reported, appears at Tr. 82-89.

JURISDICTION

The judgment of the Court of Appeals was entered November 3, 1948 (R. 30), and a petition for rehearing (R. 31-35) was denied December 6, 1948 (R. 36). By order of Mr. Justice Rutledge, dated February 23, 1949, the time for filing a petition for a writ of certiorari was extended to March 19, 1949. The petition was filed March 17, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the general court-martial which tried petitioner was without jurisdiction because of alleged defects in the pre-trial investigation of the charges.

2. Whether Article of War 4, designating the persons competent to serve on courts-martial, was unconstitutional by reason of its failure to make enlisted men eligible to sit on courts-martial which tried enlisted men.

STATEMENT

On April 22, 1945, petitioner, a private in the United States Army, was convicted in Germany by an Army general court-martial of rape and other

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hearing in the District Court. "CM R." will be used to refer to the court-martial record, the references being to the pencilled numbering at the lower right-hand corner of each page.

offenses, in violation of the 92d, 93d, and 96th Articles of War, and was sentenced to death by hanging (CM R. 1, 27-29, 111). Following review of the record by the Staff Judge Advocate of the 5th Infantry Division (CM R. 17-20), the Commanding General of the Division approved the sentence and forwarded the record of trial for action under Article of War 48 (CM R. 113). The record of trial was thereafter again reviewed by the Staff Judge Advocate, Headquarters, European Theater of Operations, United States Army (CM R. 21-24), following which the Commanding General of the European Theater of Operations, General Eisenhower, confirmed the sentence, but commuted it to life imprisonment, total forfeitures, and dishonorable discharge (CM R. 114). Thereafter, the record of trial was again reviewed by Board of Review No. 1, Branch Office of the Judge Advocate General, European Theater of Operations, which found it legally sufficient to support the findings and sentence (CM R. 4-11). This holding was approved by the Assistant Judge Advocate General, European Theater of Operations (CM R. 3). The sentence was thereupon duly promulgated (CM R. 1-2). Subsequently, by order of the Secretary of War, at the direction of the President, so much of the imprisonment portion of the sentence as was in excess of 30 years was remitted (R. 11).

On or about December 5, 1947, petitioner filed in the District Court for the District of Kansas a petition for a writ of habeas corpus (R. 1-3), which

challenged the jurisdiction of the general court-martial on the ground that, allegedly, the pre-trial investigation of the charges had not been thoroughly and impartially conducted, as required by Article of War 70 (10 U. S. C. 1542). The petition also challenged the constitutionality of Article of War 4 (10 U. S. C. 1475), limiting the persons qualified to serve on courts-martial to commissioned officers, on the ground that, as applied to the court-martial trial of petitioner, a private, it operated to deprive him of a "trial before his peers" (R. 2). A writ issued and a return was filed (R. 5-9). Following a hearing (Tr. 1-91), the writ was discharged (R. 12), and on appeal the order was affirmed (R. 30).

ARGUMENT

1. Petitioner's contention (Pet. 8-22) that the court-martial was without jurisdiction because of alleged defects in the manner in which the pre-trial investigation of the charges was conducted is now foreclosed by this Court's decision in *Humphrey* v. *Smith,* No. 457, decided April 25, 1949, holding that compliance with Article of War 70 is not a jurisdictional prerequisite to trial by general court-martial.

2. Petitioner's only other contention (Pet. 22-25)—that the "Articles of War under which petitioner was tried were unconstitutional when applied to a private soldier because of the requirement the court be composed entirely of officers, thus

denying a fair trial before peers or equals in violation of the 5th, 6th and 9th Amendments" (Pet. 22)—is also without merit. Nothing in any of the constitutional provisions cited supports petitioner's contention. See *Ex Parte Quirin*, 317 U. S. 1, 40. Until the 1948 revision of the Articles of War (Act of June 24, 1948, c. 625, Title II, § 203, 62 Stat. 628),[2] which became effective February 1, 1949 (*id.*, § 244), military personnel other than commissioned officers were never eligible to sit on courts-martial.[3] This limitation obtained before as well as since the adoption of the Constitution.[4] Under petitioner's theory, no enlisted man, at least prior to February 1, 1949, has ever been validly convicted by court-martial. The absurdity of such a con-

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[2] As amended by § 203 of the 1948 Act, Article of War 4 provides, in pertinent part, that "Enlisted persons * * * shall be competent to serve on general and special courts martial for the trial of enlisted persons when requested in writing by the accused * * *. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court."

[3] "The detailing of non-commissioned officers or soldiers, where the accused is one of these grades, with commissioned officers, on courts-martial, which is required by some of the European codes, has never been authorized by our law." Winthrop, *Military Law and Precedents* (1920 Reprint), p. 70.

[4] See British Articles of War of 1765, in force at the beginning of the Revolutionary War, Sec. XV, Art. I (Winthrop, *Military Law and Precedents* (1920 Reprint), p. 942); American Articles of War of 1775, Art. XXXIII (*id.*, p. 956); American Articles of War of 1776, Sec. XIV, Art. 1 (*id.*, p. 967); American Articles of War of 1786, Art. 1 (*id.*, p. 972); American Articles of War of 1806, Art. 64 (*id.*, pp. 981-982); American Articles of War of 1874, Art. 75 (*id.*, p. 992).

clusion is itself a sufficient answer, we think, to his contention.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court and should therefore be denied.

Respectfully submitted.

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